INDEX

PAGE

STATEMENT 1

PROCEEDINGS BELOW 2

FACTS 3

SUMMARY OF ARGUMENT 6

POINT I—The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract. 7

POINT II—The rights of Heaney and the liability of the petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application 10

POINT III—Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the General Maritime Law or interferes with the proper harmony and uniformity of that law in its international or interstate relations 13

POINT IV—The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the General Maritime Law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern .. 18

POINT V—The case of Spencer Kellogg & Sons, Inc. *v.* Hicks, 285 U. S. 502, mainly relied upon by the petitioners, is plainly distinguishable from the case at bar and is in no respect controlling 20

PAGE

POINT VI—The provisions incorporated in Section 29 of the Workmen's Compensation Law working an assignment and prescribing an additional cause of action against the negligent third party in favor of the employer and insurance carrier in no way affect the operation and validity of the Workmen's Compensation Law in respect to the accidental injuries suffered by Heaney..... 23

IN CONCLUSION 27

TABLE OF CASES CITED.

Alaska Packers Association *v.* Industrial Accident Commission, 276 U. S. 467..... 15
Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52..... 8, 17

Baizley Iron Works *v.* Span, 281 U. S. 222..... 17

Chelentis *v.* Luckenback S. S. Co., 247 U. S. 372.... 17
Crowell *v.* Benson, 285 U. S. 22..... 17
Cudahy Packing Co. *v.* Parramore, 263 U. S. 418, 423. 9

Doey *v.* Howland Co., Inc., 224 N. Y. 30..... 7

Employers' Liab. Assur. Corp. *v.* Cook, 281 U. S. 233. 17

Gonsalves *v.* Morse, etc., Co., 266 U. S. 171..... 17
Grant-Smith Porter Ship Co. *v.* Rohde, 257 U. S. 469 12, 14, 17
Great Lakes, etc., Co. *v.* Kierejewski, 261 U. S. 479... 17

Kenward *v.* The Admiral's Peoples, 295 U. S. 649..... 17
Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149..... 17

La Casse *v.* Engineering Works, 242 Mich. 454..... 16
London Guarantee & Acc. Co. *v.* Ind. Acc. Comm., 279 U. S. 109..... 17
Lumber Mutual Casualty Insurance Company *v.* Edward A. Thompson, Inc., 134 Misc. Rep. 370, 235 N. Y. S. 646 (Certiorari denied by this Court, 286 U. S. 27, after a second trial and appeal in the State courts, 137 Misc. 379, 244 N. Y. S. 20; 234 A. D. 841)..... 26

PAGE

Madderns *v.* Fox Film Corporation, 237 N. Y. 614... 15
Messel *v.* Foundation Co., 274 U. S. 427..... 17
Miller's Indemnity Underwriters *v.* Braud, 270 U. S. 59 13, 19
Minnie *v.* Port Huron, 295 U. S. 647..... 17

Northern Coal & Dock Co. *v.* Strand, 278 U. S. 142.. 17

Post *v.* Burger & Gohlke, 216 N. Y. 544..... 7

Robins, etc., Co. *v.* Dahl, 266 U. S. 449..... 17
Rosengrant *v.* Harvard, 273 U. S. 664..... 15

Southern Pacific Co. *v.* Jensen, 244 U. S. 205.....17, 20, 23
Spencer Kellogg & Sons, Inc. *v.* Hicks, 285 U. S. 502. 6, 20, 21, 27
State Industrial Board *v.* Terry & Tench Co., Inc., 273 U. S. 639 15
State Industrial Commission *v.* Nordenholt, 259 U. S. 263, 271 .....8, 9, 16
Staten Island Railway *v.* Phoenix, 281 U. S. 98.....24, 26
Sultan Railway & Timber Co. *v.* Department of Labor & Industries, 277 U. S. 136.....14, 19

Union Fish Co. *v.* Erickson, 248 U. S. 308..... 17

Zirpola *v.* T. & E. Casselman, Inc., 237 N. Y. 367..... 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 9

P. J. CARLIN CONSTRUCTION CO. and THE TRAVELERS INSURANCE COMPANY,

Petitioners,

v.

EDWARD HEANEY and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENT INDUSTRIAL BOARD OF THE STATE OF NEW YORK

Statement

This is a proceeding on writ of certiorari to the Supreme Court of the State of New York to review a judgment affirming an award to the Respondent, Edward Heaney, under the provisions of the Workmen's Compensation Law of the State of New York.

Proceedings Below

Because of injuries suffered on September 9, 1932, while in the employ of the P. J. Carlin Construction Co., the Respondent Heaney presented to the Respondent Industrial Board of the State of New York a claim for compensation under the statutes of New York known as the Workmen's Compensation Law. (Chapter 816 of the Laws of 1913, as amended and reenacted by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the Consolidated Laws, as amended.)

The said State Industrial Board assumed jurisdiction of the claim, held hearings in connection therewith, awarded compensation to said injured employee and directed payment of the award by the Petitioners, P. J. Carlin Construction Co. and The Travelers Insurance Company, employer and insurance carrier respectively.

The Petitioners challenged the making and the imposition of the award against them on the ground that the accidental injuries suffered by Heaney did not arise out of and in the course of the employment, and on the further ground that jurisdiction over the subject matter of the claim was vested solely in admiralty.

The said Petitioners thereupon appealed to the Appellate Division of the Supreme Court of New York, Third Judicial Department, from the determination of the State Industrial Board. Formal Findings of Fact and Conclusions of Law were prepared by the State Industrial Board and served on all parties in interest. (R. 4-7.)

The said Appellate Division unanimously affirmed the determination of the State Industrial Board (243 App. Div. 648).

Thereafter, the Petitioners obtained leave from the Court of Appeals of the State of New York to appeal to said Court from the Order of the Appellate Division.

The Court of Appeals of the State of New York affirmed the Order of the said Appellate Division (269 N. Y. 93). Crouch, Loughran and Finch, JJ., concurred in the opinion for affirmance written by Hubbs, J. (R. 55-61). Crane, Ch. J., dissented in an opinion in which O'Brien, J. concurred (R. 61-67). Lehman, J. also dissented (R. 67).

The findings of law and fact of the State Industrial Board (R. 4-7) were thus affirmed by the State Appellate Courts thereby establishing that the accidental injuries suffered by Heaney arose out of and in the course of the employment and that the Industrial Board of the State of New York was vested with jurisdiction over the claim.

Facts

On September 9, 1932, Edward Heaney was a bricklayer employed by the Petitioner, P. J. Carlin Construction Co., and received injuries on that day as a result of being thrown from the steamer "Observation" into the water by reason of an explosion in or about said steamer (R. 11, 14, 17, 18). Said steamer or ferryboat was proceeding from Manhattan Island to Riker's Island, within the boundaries of the State of New York (R. 18, 26).

At the time of the said explosion and prior thereto, the P. J. Carlin Construction Co. was the general contractor in connection with certain penitentiary construction work on Riker's Island, New York, which was being performed pursuant to a contract with the City of New York (R. 27, 30, 50).

The contract between the City of New York and the P. J. Carlin Construction Co. contained the following clause:

> "Each Contractor shall investigate the existing means of transportation to and from Rikers Island.

> The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract." (R. 15, 23, 50.)

Subsequent to the execution of the aforesaid contract, the P. J. Carlin Construction Co. entered into an agreement with George I. Forsyth, owner of the steamer, "Observation", whereby the latter was to "operate a ferry service for the transportation of men engaged upon the construction of the Riker's Island Penitentiary Building" upon certain terms and conditions (R. 28, 33, 46, 47). Among other terms of this contract was one providing that Forsyth was to be compensated for this transportation by collecting fares from the men at the rate of ten cents a round trip. The P. J. Carlin Construction Co. guaranteed to Forsyth a daily total of $60.00 in fares (R. 47).

The steamer "Observation" was not owned, operated or controlled by the P. J. Carlin Construction Co. (R. 28). The said company was not a carrier in any sense nor was it interested in the investment of money in ships. There is no evidence in the record to show that the said company, or in fact anyone else, was guilty or legally implicated in a maritime tort.

Heaney performed no duties on said steamer nor had any connection with the operation thereof. At the time of the accident he was merely being transported to Riker's Island.

The only means of transportation between the Mainland and Riker's Island was the steamer "Observation" and the municipal ferry (R. 17). The employees of P. J. Carlin Construction Co. were instructed by the said employer to use only one means of transportation from the Mainland to Riker's Island and return, namely, the steamer

"Observation" and were forbidden to ride on the municipal ferry (R. 15-17, 21).

The record discloses that the employer issued passes to the employees (R. 35), generally supervised their conduct while on the steamer "Observation" (R. 21, 24, 45) and restricted the employees, including the Respondent, Heaney, to this one means of ingress to and egress from Riker's Island (R. 16).

In the Appellate Courts of New York State, the Petitioners herein contended that the injuries sustained by the Respondent, Heaney, did not arise out of and in the course of the employment, and that the matter of the claim was subject to maritime jurisdiction. These issues were determined adversely to the contention of the Petitioners in both the Appellate Division of the Supreme Court, Third Judicial Department, and the Court of Appeals of the State of New York.

The record in the case at bar contains no proof establishing a tort. It merely discloses that the Respondent, Heaney, suffered injuries as a result of being thrown into the water by reason of an explosion in or about the steamer "Observation". The record also discloses that the owner of the steamer "Observation" lost his life in the same occurrence.

In the catastrophe aforementioned, many other workmen on board lost their lives and many others were injured. Because of the circumstances, resort to the beneficial provisions of the Workmen's Compensation Law seems to be the only course available whereby the welfare of scores of workmen and their dependents will be reasonably secured.

Summary of Argument

1. The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract.

2. The rights of Heaney and the liability of the Petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application.

3. Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.

4. The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern.

5. The case of *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, mainly relied upon by the Petitioners, is plainly distinguishable from the case at bar and is in no respect controlling.

6. The provisions incorporated in Section 29 of the Workmen's Compensation Law working an assignment and prescribing an additional cause of action against the negli-

gent third party in favor of the employer and insurance carrier in no way affect the operation and validity of the Workmen's Compensation Law in respect to the accidental injuries suffered by Heaney.

POINT I

The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract.

A proceeding under the Workmen's Compensation Law of the State of New York is not one founded upon or sounding in tort. Tort is not an element in the liability created by the Act. On the contrary, the basis of this legislation is liability without fault and the whole idea of tort or wrong is eliminated by the statute.

The principle of compensation is the payment of the employer's share of a common loss in a common undertaking. The status existing between the employer and employee is of a contractual or quasi-contractual nature. It results from a domestic contract of hire employing within New York State a resident thereof. The obligations become effective when the statutory conditions concur to fix the right to indemnity for injury or death and the direct subject matter of the adjudication is the obligation to compensate the employee or his dependents because of the hiring.

The obligation at the base of an award is one imposed by the State and attaches to every contract of hiring within the terms of the Act.

In *Post* v. *Burger & Gohlke*, 216 N. Y. 544, and later in *Doey* v. *Howland Co. Inc.*, 224 N. Y. 30, the Court of

Appeals of the State of New York outlined the underlying philosophy of the Workmen's Compensation Law of that State. The Court said in the latter case:

> "* * * In determining whether a contract be of maritime nature, locality is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done. (*Erie R. R. Co.* v. *Welsh*, 242 U. S. 303.) In torts the rule is different. There, jurisdiction depends solely upon the place where the tort was committed, which must have been upon the high seas or other navigable waters. (*Atlantic Transport Co. of W. Va.* v. *Imbrovek*, 234 U. S. 52.) An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment." (pp. 35, 36.)

The above portion of the citation from the *Doey* case, *supra*, was quoted among other things in the opinion in *State Industrial Commission* v. *Nordenholt*, 259 U. S. 263, 271, and appears to have been approved by this Court. Although this Court in the course of the opinion in *Nordenholt, supra* (p. 272), disapproved the deductions drawn by the New York Court of Appeals in certain cases, it seemingly found no fault with the reasoning in the above quoted portion of the opinion in the *Doey* case.

As a matter of fact, this Court appears to have recognized the possible force of this philosophy by the following statement in *State Industrial Commission* v. *Nordenholt, supra:*

> "* * * Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as implied agreements or otherwise." (p. 276.)

Generally in the same connection, in *Zirpola* v. *T. & E. Casselman, Inc.*, 237 N. Y. 367, the New York Court of Appeals, by Cardozo, J., said:

> "* * * The Workmen's Compensation Act regulates the relation, not between a workman and the world at large, but between workman and employer. It does indeed wipe out the right of action against the employer, whether in favor of the workman himself or in favor of his personal representatives for the benefit of next of kin (*Shanahan* v. *Monarch Engineering Company*, 219 N. Y. 469). In doing this, it charges the employer with liabilities of a different order. It leaves untouched, on the other hand, the duties and liabilities of wrongdoers outside of the relation which it regulates, and contents itself with guarding against a duplication of benefits by appropriate provisions for subrogation or allowance." * * * (p. 373.)

Although this Court in *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 423, in which an award under the workmen's compensation law of the State of Utah was involved, stated that workmen's compensation legislation rests upon the idea of status, and not upon that of implied contract, it is plain that this statement in no wise indicates that the rights of a claimant under the workmen's com-

pensation law sound in tort, and admittedly such statement is entirely consistent with the contentions herein that the rights of the claimants under the New York Workmen's Compensation Law derive from contract inasmuch as this status becomes effective only after the consummation of a contract of hire and as an incident thereof.

POINT II

The rights of Heaney and the liability of the petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application.

The Petitioner, P. J. Carlin Construction Co., the employer of Heaney, was not the owner of the steamship "Observation", employed none of the crew thereof, nor in any way engaged in aiding the vessel in the performance of her mission as a vessel. The entire responsibility for the carriage and safety of the passengers of the steamship "Observation" reposed solely upon Forsyth, the owner thereof, and rested in no respect upon the P. J. Carlin Construction Co.

The P. J. Carlin Construction Co. was not the operator of the boat, was not a carrier in any sense, was not interested in any investment in ships, and was not in any manner guilty or legally implicated in a maritime tort.

The P. J. Carlin Construction Co. merely undertook the responsibility of guaranteeing the deficiency between fares collected each day by the owner of the "Observation" and an average of $60.00. It had nothing whatever to do with the control of the vessel, its movements or its operation within the domain of maritime commerce or transportation.

Heaney performed no duties in connection with said steamship and the work for which he was employed was not of a maritime nature and had nothing to do with a maritime employment. He was employed as a bricklayer to aid in the construction and erection of certain buildings on Riker's Island within the confines of the State of New York. His duties had no direct or indirect effect on navigation or commerce and were of pure local concern.

He sought no recovery against the employer, P. J. Carlin Construction Co., in the compensation proceeding because of any wrong perpetrated by the employer, but sought a recovery as the result of injuries for which the compensation statute, read into the contract, gave a right to recovery.

He was not an employee of Forsyth, the owner of the steamship, and sought compensation before the State Industrial Board because of no relationship existing between Forsyth and himself or between the employer, P. J. Carlin Construction Co., and Forsyth. He had nothing to do with the steamship except that the boat became the means of ingress and egress to the locality of his work. His presence on the boat was merely incidental to his duties as a bricklayer under his contract of employment, the same as though he approached his work on Riker's Island by means of a single bridge or roadway.

The rights and liabilities of Heaney and his employer had no direct relation to navigation and the application of the local law would not affect rules of the sea whose uniformity is essential. As was concisely said by Hubbs, J., in the opinion of the Court of Appeals in this case:

> "The contract of employment was for the services of the claimant in the erection of a building. It was not a contract to do work upon a vessel in navigable waters nor even to do work remotely connected

with any undertaking having to do with navigation or commerce. The presence of the claimant upon the boat was a mere incident of the contract of employment, it having been found as a fact that he was on the boat as an employee of the contractor against whom the award has been made." (R. 56.)

The non-maritime aspects of Heaney's employment and services are not entirely unlike the non-maritime character of the contract for the construction of "The Ahala" and the employment of the injured employee in connection therewith in *Grant-Smith Porter Ship Co.* v. *Rohde*, 257 U. S. 469.

In that case, the application of the workmen's compensation law of Oregon to a claim for an injury to a carpenter who was constructing a bulkhead on an incompleted vessel lying in navigable waters was involved. The Court said:

"The contract for constructing 'The Ahala' was nonmaritime, * * *. The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. Union Fish Co. *v.* Erickson, 248 U. S. 308, 63 L. ed. 261, 39 Sup. Ct. Rep. 112." (pp. 475, 476.)

* * * * * * *

"The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." (p. 476.)

It consequently follows that since the theory of an award under the Workmen's Compensation Law is contractual in nature and not delictual, the place of injury is unimportant when the contract of employment or the essential characteristics of the employment is non-maritime. Heaney's employment, being non-maritime, the existence of a maritime tort or its locality is therefore immaterial and the application of the Workmen's Compensation Law works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony and uniformity of that law in its international or interstate relations.

POINT III

Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.

The case of *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 59, concerned a diver who submerged himself from a floating barge anchored in the navigable Sabine River, thirty-five feet from the bank, for the purpose of sawing off timbers of an abandoned set of ways, once used for anchoring ships, which had become an obstruction to navigation. The air supply failed and he died of suffocation. The application of the local workmen's compensa-

tion law was upheld by this Court. This Court, referring to *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, said:

> "The words of the local statute applied to the employment and prescribed an exclusive remedy. We said the cause was controlled by the principle that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes."

This Court further said in respect to the case then under consideration:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

In the case of *Sultan Railway & Timber Co.* v. *Department of Labor & Industries*, 277 U. S. 136, the question at issue was whether men employed in handling and riding logs on navigable waters were brought within the operation of the State workmen's compensation laws. This Court, upholding the operation of the local state law, said:

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work

material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." (p. 137.)

In the case of *Alaska Packers Association* v. *Industrial Accident Commission*, 276 U. S. 467, the workman was employed to perform services in connection with the fish canning business and was injured while attempting to push a stranded boat into navigable water. This Court stated:

> "Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character." (p. 469.)

In *Madderns* v. *Fox Film Corporation*, 237 N. Y. 614, the claimant while in the employ of the defendant, Fox Film Corporation, a manufacturer of moving picture films, and engaged in helping to make a picture on a boat in the Hudson River, fell into the water, and as a result, developed tuberculosis. The defendant contended that the State Industrial Board had no jurisdiction, the case being one within admiralty jurisdiction. The Court of Appeals of the State of New York upheld the award made by the State Industrial Board pursuant to the provisions of the Workmen's Compensation Law of that State.

The same principles pronounced in the above mentioned cases were also proclaimed by the decisions of this Court in the cases of *State Industrial Board* v. *Terry & Tench Co., Inc.*, 273 U. S. 639, and *Rosengrant* v. *Harvard*, 273 U. S. 664.

It will be observed that in the foregoing cases, the injuries were suffered on navigable waters and the employment partook of a maritime character. Nevertheless, the strict rule of exclusive federal jurisdiction did not apply and the recovery under local state compensation laws was approved and allowed.

The location of an injury upon navigable waters becomes significant only when the contract of employment or the nature of employment is maritime and the application of the workmen's compensation law would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations. If the subject matter of the contract of hire or the employment is non-maritime, the place of the injury as heretofore pointed out is unimportant and becomes merely a matter of local concern. Also, if the injury occurs on land, the local workmen's compensation law applies even though the nature of the employment or the contract of hire is essentially maritime. (*State Industrial Commission* v. *Nordenholt, supra.*)

However, where the facts clearly establish that the matter is of mere local concern, as in the case at bar, the application of the workmen's compensation law is in no way incompatible with the general features and purposes of the maritime law.

La Casse v. *Engineering Works*, 242 Mich. 454.

The cases cited and mainly relied upon by the Petitioners can be readily reconciled with the above outlined principles and doctrines. In these cases the injuries were sustained on navigable waters, the contract of hire or the subject matter of the employment was clearly maritime and the application of the local compensation laws would seriously encroach on admiralty jurisdiction by direct in-

terference with navigation and maritime affairs. In many of these cases the facts disclose that either the original proceeding was a libel *in rem* or recovery was sought from the owner or operator of the vessel in connection with which the injuries were sustained.

The principal cases cited by the Petitioners falling within the above limitations, are:

Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52;
Baizley Iron Works v. *Span*, 281 U. S. 222;
Chelentis v. *Luckenback S. S. Co.*, 247 U. S. 372;
Crowell v. *Benson*, 285 U. S. 22;
Gonsalves v. *Morse, etc., Co.*, 266 U. S. 171;
Great Lakes, etc., Co. v. *Kierejewski*, 261 U. S. 479;
Employers' Liab. Assur. Corp. v. *Cook*, 281 U. S. 233;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
London Guarantee & Acc. Co. v. *Ind. Acc. Comm.*, 279 U. S. 109;
Messel v. *Foundation Co.*, 274 U. S. 427;
Minnie v. *Port Huron Terminal Co.*, 295 U. S. 647;
Northern Coal & Dock Co. v. *Strand*, 278 U. S. 142;
Robins, etc., Co. v. *Dahl*, 266 U. S. 449;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205.

For the same reasons mentioned above the case of *Kenward* v. *The Admiral's Peoples*, 295 U. S. 649, cited in the dissenting opinion below and also by the Petitioners, is distinguishable from the case at bar inasmuch as the proceeding therein concerned a libel *in rem* brought by an injured passenger against the vessel.

Confirmation of the aforesaid is found in *Grant Smith-Porter Ship Co.* v. *Rohde, supra*, wherein this Court stated, in referring to the cases of *Jensen, Chelentis, Stewart, supra*, and *Union Fish Co.* v. *Erickson*, 248 U. S. 308, that;

> "In each of them the employment or contract was maritime in nature and the rights and liabilities of

the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity." (p. 477.)

POINT IV

The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern.

The above heading is divisible into the following three appropriate considerations:

1. Does the application of the Workmen's Compensation Law in the case at bar work any material prejudice to the characteristic features of the General maritime law?

2. Does it interfere with the proper harmony and uniformity of that law in its international and interstate relations?

3. Is the subject matter of Heaney's claim other than of purely local concern?

Respondent submits that the burden of a satisfactory affirmative to the challenges contained in the above three subdivisions rests with the Petitioners herein. In so far as the proof in the record is concerned, no attempt to support the affirmative in any instance is evident. Nor has the burden been met by the Petitioners of establishing an admiralty tort or that P. J. Carlin Construction Co., the employer, or Forsyth, the owner of the boat, were guilty or legally implicated in a maritime tort.

On the other hand, no distinction in principle exists between the case at bar and the *Braud, Sultan* and other cases cited *supra* under the previous point, and in view of all the attending facts and circumstances in the instant case, a negative answer to each of the above propositions is unquestionably justified.

As more fully pointed out heretofore, the Petitioner, P. J. Carlin Construction Co., was not the owner of the steamship "Observation", employed none of the crew, was in no way engaged in aiding the vessel in the performance of her mission, was not a carrier in any sense, was not interested in the investment in ships and was in no manner guilty or legally implicated in maritime tort.

To the same effect, Heaney performed no duties in connection with said steamship, was not an employee of the owner of the vessel and his duties had no direct or indirect effect on navigation or commerce but were of pure local concern. He was employed as a bricklayer in the construction and erection of buildings on Riker's Island, within the territorial confines of the State of New York.

Heaney was engaged in the performance of a contract non-maritime in nature. The recovery which he seeks is a part of the compensation constructively agreed to be paid for the services rendered in the course of his employment. Clearly if Heaney's action were for wages due under the contract of employment, the Federal Court would have no jurisdiction. Jurisdiction is not conferred on that Court because another part of the agreed compensation is sought to be recovered, or because there happens to be an independent contract for passage with a third party or a tort liability on the part of the third party.

The main purpose sought to be achieved by granting to Federal authority exclusive jurisdiction of the maritime law is to guarantee the harmony and uniformity of that

law throughout the United States. Hence, the owner of a vessel or the operator thereof is and properly should be subject to the same rights, liabilities and immunities in connection therewith regardless of the location of the vessel in the navigable waters of the United States.

However, in the case at bar, P. J. Carlin Construction Co. was not a carrier or an owner of a vessel, and had no maritime rights or immunities to be safeguarded. Heaney is not seeking to enforce any rights as a passenger, but as an injured employee or workman, and applying the Workmen's Compensation Law of the State of New York as a means and method for his recovery does not affect navigation or the harmony or uniformity of the maritime law.

In closing the discussion under this heading, it should also be said that a subsidiary criterion recognized by this Court seemingly is the policy of Congress of encouraging investments in ships. This was adverted to in *Southern Pacific Co.* v. *Jensen, supra.* The record does not disclose that the P. J. Carlin Construction Co. was an investor in ships or in any way interested in shipping or maritime matters.

POINT V

The case of *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, mainly relied upon by the petitioners, is plainly distinguishable from the case at bar and is in no respect controlling.

The procedural element, probably, is the most vital consideration in *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502. The suit was brought in admiralty to limit the owner's liability and all claimants were brought into concourse. The Court itself was in position to afford compre-

hensive and adequate relief and was governed by fundamental principles of the equity jurisdiction.

> "But we think" this Court said, "that the admiralty court, having taken jurisdiction and brought all claimants into concourse, should have given complete relief." (p. 512.)

The *Hicks* case, *supra*, is differentiated from the case at bar, as will be indicated by the observations of this Court with reference to the surrounding circumstances:

> "Those who were killed and injured in the disaster were of three classes: (1) Regular employees of Kellogg & Sons in the Edgewater plant. (2) Men who had applied on December 18 for work in discharging the cargo of a ship expected on that day. She did not then arrive, and they were given employment check stubs and told to return on the following day, which they did; but as she had not then docked they were advised to report again on the morning of the accident. * * * (3) Men seeking employment in answer to an advertisement for laborers inserted in the New York newspapers, * * *." (p. 508.)
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> * * * * * * *
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> "Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. The injury to the passengers resulted from negligence of the company's agents in the navigation of the launch. It was a maritime tort." (pp. 512, 153.)
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> * * * * * * *
>
> "Kellogg & Sons sustained towards employees injured or killed the dual relationship of a carrier by water and a general employer at its Edgewater plant.

Under the federal statutes the company, acting in the first capacity, was entitled to a limitation of liability unless the claimants could prove negligence with the owner's privity or knowledge. They assumed the burden of proving such negligence. They sustained it and are entitled to recover according to the rules of the maritime law, including, of course, any applicable death statute." (p. 514.)

The principal distinguishing features between the *Hicks* case, *supra*, and the case now before this Court become more apparent by the following summarized comparison in which we designate the matter referring to the *Hicks* case as "A" and the matter referring to the case at bar as "B".

1. *"A"* The employer in the *Hicks* case was the owner of the boat, the "Linseed King."

"B" The employer of Heaney was not the owner of the "Observation".

2. *"A"* The employer in the *Hicks* case "undertook the interstate carriage of passengers by water on a launch operated by its servants."

"B" The employer of Heaney was not a carrier in any sense whatsoever, and the carriage in any event was not inter but intrastate.

3. *"A"* The owner in the *Hicks* case "sustained toward employees injured or killed the dual relationship of a carrier by water and a general employer". As owner it "was entitled to a limitation of liability unless the claimants could prove negligence with the owner's privity or knowledge".

"B" The employer of Heaney sustained the single relationship of employer, and had no right to limit his liability under the federal statutes.

4. *"A"* A moving consideration in the decision in the *Hicks* case is reflected by the citation and

quotation of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, in respect to the inconsistency of the compensation acts "with the policy of Congress to encourage investment in ships".

"*B*" The employer of Heaney was not an investor in ships and may not avail himself of any such argument.

5. "*A*" The owner of the "Linseed King" in the *Hicks* case was guilty of maritime tort which is the basis of the Court's decision that admiralty alone had jurisdiction.

"*B*" Not only is there no evidence or claim that the employer of Heaney was guilty of or legally implicated in a maritime tort, but the record discloses no evidence whatsoever of a maritime tort and consequently there is no basis for admiralty jurisdiction.

In the case at bar, the P. J. Carlin Construction Co. was not a carrier of passengers by water, it was not guilty of a maritime tort and the proceeding on the claim of Heaney was not one to "impose liability for such a tort", as the proceeding in the *Hicks* case, *supra*, was held to be.

POINT VI

The provisions incorporated in Section 29 of the Workmen's Compensation Law working an assignment and prescribing an additional cause of action against the negligent third party in favor of the employer and insurance carrier in no way affect the operation and validity of the Workmen's Compensation Law in respect to the accidental injuries suffered by Heaney.

The Petitioners allege in substance that the Workmen's Compensation Law of the State of New York is invalid as applied to an injury occurring on navigable waters,

as the provisions of Section 29 of the Act accords an assignment and transfer to the employer and insurance carrier of the employee's cause of action against a negligent third party, and also because it provides for the recovery by the same parties from a negligent third person of such sums directed paid into the Special Funds prescribed by other sections of the act, or expended for certain other purposes, in death cases where no persons are entitled to compensation.

The constitutionality of Section 29 of the Workmen's Compensation Law was upheld by the Supreme Court of the United States in the case of *Staten Island Railway* v. *Phoenix*, 281 U. S. 98.

The issue in the present case only concerns the right of recovery of the Respondent Heaney, and the liability of his employer under the Workmen's Compensation Law of New York State for injuries occurring in the course of the employment and has no relation to a possible cause of action against any third party. Whether Section 29 accorded Heaney an election of remedies or preserved to him or to his employer or insurance carrier the right to proceed against a third party patently is not relevant and entirely beside the issues.

The right to compensation is not dependent upon the existence of a claim or cause of action against a third party. The right of an employer and insurance carrier to be subrogated to any rights which the injured employee might have against a third party is merely a statutory right, an additional consideration or favor accorded to the employer and insurance carrier in the compensation scheme.

The effect of the statute is not to guarantee collection of damages as a result of the assignment, and no liability on the part of a third party is created by the statute. As was aptly said in the opinion of the Court below,

the assigned cause may be valueless as the result of contributory negligence on the part of the injured employee, inability of the assignee to establish negligence on the part of the third party, financial irresponsibility of the third person, or that conduct, tortious under the law of the forum where the compensation contract is enforceable, is not tortious under the law of the forum where the accident occurred.

Likewise, no sound reason is manifest for the nullification of the rights and liabilities between the parties under the compensation law for the reason that there exists incapacity on the part of the assignee of the cause of action, based upon the possible tort liability of a third person to maintain an action thereon. To do so would defeat the main purpose of the compensation contract of which the provision for assignment is a mere incident. The fact that the assigned cause may prove of no value in the hands of the assignee is a matter wholly foreign to the liability arising out of the employer-employee relationship.

In respect to the possible additional cause of action provided by Section 29 where payment is made to the special funds in all cases of death where there are no persons entitled to compensation, while it is not relevant in the case, the Court's attention is respectfully called to the fact that should a third party who has the right to resort to admiralty be sued, there is nothing in the Workmen's Compensation Law, and more particularly in Section 29 thereof, which would deprive said individual of the right to limit his liability.

Neither will anyone deny that a negligent third party may interpose as a defense the contributory negligence of the employee, or any other appropriate defense, in any action brought by the employer or insurance carrier under this Section. Likewise, there seems little doubt that the same defenses would be available by virtue of the gen-

eral maritime law. Section 29 nowhere indicates otherwise or that the proper uniformity and harmony of the maritime law would be imperiled by that section.

In the case at bar, there is no death claim nor is there any evidence to show a right of action by Heaney against a third party for negligence. The owner of the steamboat "Observation", as the evidence shows, is dead. In addition thereto, as pointed out hereinabove, there is no evidence of any kind in the record disclosing negligence of a third party.

The Petitioners contend that the state can not create, enlarge, diminish or destroy the rights and liabilities incident to the maritime law. Section 29 attempts none of these things. As the Court in *Staten Island Railway* v. *Phoenix Co., supra,* stated at page 108:

> "In an action to enforce it, (the $1,000 payment to the State Fund) the appellant could as the State Court has held in the present case, 'avail itself of any defense which it has or ever had'."

In *Lumber Mutual Casualty Insurance Company* v. *Edward A. Thompson, Inc.,* 134 Misc. Rep. 370, 235 N. Y. S. 646 (certiorari denied by this Court, 286 U. S. 27, after a second trial and appeal in the state courts, 137 Misc. 379, 244 N. Y. S. 20; 234 A. D. 841), the Appellate Term of the Supreme Court of the State of New York, in directing a new trial, held that Section 29 of the Workmen's Compensation Law does not interfere with the proper harmony and uniformity of the maritime law. The Court there said:

> "As was pointed out in the Jensen case (page 216 of 244 U. S. (37 S. Ct. 524)) the saving clause of section 256 (now 28 USCA §371) of the Judicial Code leaves some power in the states to affect by state legislation the general maritime law. * * * No act of Congress expressly declaring against as-

signing a chose in action for a maritime tort has been called to our attention. * * * The right of an assignee of a chose in action to sue in his own name was recognized in admiralty long before it was permitted in common law. See Minturn *v.* Alexandre (D. C.) 5 F. 117; Cobb *v.* Howard, 3 Blatchf. 524, Fed. Cas. No. 2924."

It is also significant to observe that in the *Hicks* case, *supra*, the next of kin of the deceased, even though admiralty did not and does not provide therefor, were allowed to present their claims before the United States Equity Court because the laws of the State of New York gave to such individuals a cause of action in the event of death caused by negligence.

Furthermore, the enforcement by an assignee of a cause of action in tort is not repugnant to the general policy of Congress. In the Longshoremen's and Harbor Workers' Compensation Act, Congress has provided that the cause of action of an injured employee coming within the purview of that act is assigned to the employer paying compensation which he may enforce.

IN CONCLUSION

It is submitted that the aforesaid establishes as follows:

A. The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract.

B. The rights of Heaney and the liability of the petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application.

C. Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.

D. The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern.

Wherefore, the judgment below should be affirmed with costs.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the State of New York.

HENRY EPSTEIN,
Solicitor General,
Solicitor for the Industrial Board of the State of New York, Respondent.

JOSEPH A. MCLAUGHLIN,
ROY WIEDERSUM,
Assistant Attorneys General,
Of Counsel.